Professional Liability Insurance Coverage Issues

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IV. PROFESSIONAL LIABILITY INSURANCE COVERAGE ISSUES

A. Claim Notification and Reporting Issues

1. What is a "Claim"?

a. Generally

The term "claim" is almost always defined by the professional liability insurance policy. Policies issued in New York offer varying definitions of what will constitute a "claim." This has a direct impact on an attorney's obligation with respect to reporting to the insurance company.

b. Case Law

- Chicago Ins. Co. v. Borsody, 165 F. Supp. 2d 592, 596-597 (S.D.N.Y. 2001) "Claim" is defined in the "Definitions" section of the policy as follows: ""Claim" means a *demand for money or services, or the filing of suit or institution of arbitration proceedings or alternative dispute resolution* naming an Insured and alleging a negligent act, error, omission or Personal Injury resulting from the rendering of or failure to render Professional Services ..."

- Coregis Ins. Co. v. Lewis, Johs, Avollone, Aviles & Kaufman, LLP, 2006 U.S. Dist. LEXIS 55326 (S.D.N.Y. 2006) - The term "claim" is defined in the Policy as *"a demand made upon any insured for damages, including, but not limited to, service of suit or institution of arbitration proceedings against any insured*."

- Kleyman v. Cont'l Cas. Co., 2007 U.S. Dist. LEXIS 247 (E.D.N.Y. 2007) - The policy defines "claim" as "a demand received by [the insured] for money or services naming [the insured] and alleging an act or omission . . . in the rendering of professional services . . . . [including] the service of suit."

- Phila. Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP, 379 F. Supp. 2d 442, 447 (S.D.N.Y. 2005) The policy defined a "Claim" as "a demand made upon any insured for damages, including, but not limited to, service of suit or institution of arbitration proceedings against any INSURED." (Id.)

2. What Constitutes "Notice of Circumstances That May Give Rise to a Claim"

a. Generally

Giving notice of a "claim" is relatively straightforward; it is the potential claim or "notice of circumstances that may give rise to a claim" which lead to the most problems with respect to coverage for professional liability claims. The determination of whether an attorney has sufficient factual information to know that he or she is the subject of a potential claim and, thus, obligated to report the matter to their professional liability insurer is a critical one. There are several recent cases dealing with this issue, leading to several different outcomes. The only rule that can be discerned from these holdings is that an attorney should err on the side of caution and report all potential claims to avoid being left with no coverage.

b. Typical Policy Language

"Upon the insured becoming aware of *any negligent act, error, omission or Personal Injury in the rendering of or failure to render Professional Services which could reasonably be expected to be the basis of a Claim* covered hereby, written notice shall be given by the Insured, or its representative to the Company together with the fullest information obtainable.

"Upon the Insured becoming aware of *any negligent act, error, omission or Personal Injury in the rendering of or failure to render Professional Services which could reasonably be expected to be the basis of a Claim* covered hereby, written notice shall be given by the Insured, or its representative to the Company together with the fullest information obtainable *as soon as practicable.*

"The Insured, as a condition precedent to this policy, shall *immediately* provide Notice to the Company if any Insured has *any basis to believe that any Insured has breached a professional duty or to foresee that any such act or omission might reasonably be expected to be the basis of a Claim*."

If the policy is silent as to when notice must be given, "the law implies a duty to give timely notice within a reasonable time," and it is the insured's burden to demonstrate satisfaction of all conditions precedent, including timely

notice." Thomson v. Power Authority of State of N.Y., 217 A.D.2d 495, 629 N.Y.S.2d 760, 761 (1st Dep't 1995).

c. Determining Whether Notice Is Required

In New York, the case law generally concludes that the question of the reasonableness of determining whether something has risen to the level of a potential claim is one for the fact finder; however several courts have held that, reasonableness can be determined by the court as a matter of law. See e.g., Adams v. Chicago Ins. Co., 192 F. Supp. 2d 84 (S.D.N.Y. 2002), aff'd in part, vacated in part, 49 Fed. Appx. 346, 2002 U.S. App. LEXIS 22340 (2d Cir. 2002) (unpublished)

d. Case Law

1) Representative Cases – Notice Requirements on Potential Claims

Wilson v. Quaranta, 18 A.D.3d 324, 795 N.Y.S.2d 532 (1st Dep't 2005) – Attorney failed to give insurer notice of a potential malpractice claim "as soon as practicable." Court found as a matter of law, the attorney could not have "had a reasonable belief that plaintiff would not or could not assert a malpractice claim against him." In this case, the attorney had filed an untimely notice of claim against the City of New York which inaccurately set forth the place of injury. The court noted that the attorney was responsible for providing notice of the potential claim, at the latest, when he learned of the court's denial of his application to amend and deem timely plaintiff's notice of claim against the City. The court ruled that the attorney's subsequent 8 1/2 -month delay in notifying CIC of the potential claim was unreasonable as a matter of law. The court further rejected the attorney's argument that he did not have to give notice of the potential claim while the plaintiff still had the ability to take an appeal from the adverse order.

Cass v. American Guarantee & Liability Ins. Co., 13 Misc. 3d 1238A; 2006 N.Y. Misc. LEXIS 3358 (Sup. Ct. N.Y. County 2006) – In this action, the attorneys claimed that their first notice of any potential claim was the receipt of a summons and complaint for legal malpractice. The court rejected their argument as a matter of law, finding that the

attorneys were clearly aware of a potential claim arising from their legal services in a worker's compensation matter as a result of a decision from the Worker's Compensation Board. The decision "specifically noted plaintiffs' failure to give the WCB judge notice, prior to the hearing date, that the doctor testifying on their client's behalf would not be able to appear for the second time, which plaintiffs were aware of for two weeks before the hearing, and which led to the preclusion of the doctor's testimony. The WCB decision further noted that plaintiffs did not request to cross-examine the opposition's orthopedist on his final report of no disability, which report, therefore, was uncontradicted." In determining that there was notice of potential claim as a matter of law, the court noted that the attorneys "were aware that their client would see the [WCB] decision, criticizing their representation and denying her benefits."

In response to the attorneys' argument that there was no malpractice and, thus, no obligation to report the potential claim, the court noted that "the issue is not whether or not [the attorneys] actually committed malpractice, or whether they subjectively believed that there was no conduct which could give rise to a claim, but whether a reasonable attorney would have expected a malpractice claim under the circumstances."

Ingalsbe v. Chicago Insurance Co., 704 N.Y.S.2d 697, 270 A.D.2d 684 (3rd Dept. 2000) – Attorney had two consecutive professional liability policies with two insurers. The court held that the first insurer had no coverage obligation because the attorney only reported the matter after the policy had expired (and, more importantly, had known about a potential claim by virtue of his knowledge that he had missed the statute of limitations for the underlying claim during the policy period and had failed to report it). The court also held that the second insurer also had no obligation to provide coverage for the legal malpractice claim because the attorney knew before the inception of the policy that he had missed the statute of limitations on the underlying action and, thus, could not assert that he did not have a "reasonable basis to believe that he had breached a professional duty or to foresee that a claim would be made against him" prior to the inception of the second policy.

Adams v. Chicago Ins. Co., 192 F. Supp. 2d 84 (S.D.N.Y. 2002), aff'd in part, vacated in part, 49 Fed. Appx. 346, 2002 U.S. App. LEXIS 22340 (2d Cir. 2002) (unpublished) – Attorney was on notice of potential claim when co-counsel failed to file suit before the expiration of the statute of limitations. Although attorney might have reasonably believed that there was a chance of tolling the statute of limitations, once he began to urge the client to withdraw the underlying lawsuit (and not to argue for tolling), he "was clearly on notice of a potential claim, notwithstanding the good relations between his client and him."

Bellefonte Ins. Co. v. Eli D. Albert, P.C., 472 N.Y.S.2d 635, 99 A.D.2d 947 (1st Dep't 1984) – In this case the court held that although the attorney's knowledge of the assertion of a Statute of Limitations affirmative defense in a wrongful death action "did not give rise to a reasonable expectation that a malpractice claim might be filed," the dismissal of the underlying complaint on those grounds triggered the attorney's obligation to report the matter as a potential claim. Moreover, the court ruled that waiting for the affirmance of the order dismissing the complaint was unreasonable.

Sirignano v. Chicago Ins. Co., 192 F. Supp. 2d 199, 204 (S.D.N.Y. 2002) – The court held that it "could not be any clearer" that the attorney failed to timely give the insurer notice of a potential claim where the underlying action was dismissed as abandoned in January 1999 and the attorney had done nothing to restore the case to the calendar within the 1-year period under CPLR 3404. The Court specifically noted that the attorney's "knowledge of that dismissal was alone sufficient to create the reasonable expectation of a malpractice claim."
But see Cade & Saunders, P.C. v. Chicago Ins. Co., 307 F.Supp.2d 442 (N.D.N.Y. 2004) Finding issues of fact precluded finding summary judgment in favor of insurer or attorneys where the attorneys' failure to disclose an expert before trial resulted in preclusion order. Attorneys asserted that reasonable belief of no potential claim was based upon close familial relationship between one of the insured attorneys and the plaintiff.

2) Representative Cases – Notice Requirements For Actual Claims

This area of reporting is clear and usually does not present any issues for the insurer or the attorneys. Once an insured attorney received a summons and complaint, there usually is no question about the need to provide it to the insurer without delay. However, issues can still arise.

See Chicago Ins. Co. v. Borsody, 165 F. Supp. 2d 592, 600 (S.D.N.Y. 2001) – Despite fact that insured had previously reported main action against him and had reserved, court held that failure to report a cross-claim asserted in the action for 40 days was fatal. The court specifically noted that the policy at issue required notice of "'every' demand, notice or process" received by the insured

e. Reasonable Belief of Non-Liability

Courts have long held that a reasonable belief in non-liability may excuse an insured's failure to give timely notice of a potential claim. Sirignano v Chicago Ins. Co., 192 F. Supp. 2d at 204; Wilson v Quaranta, 18 A.D.3d 324, 795 N.Y.S.2d 532 (1st Dep't 2005); Sayed v Macari, 296 A.D.2d 396, 744 N.Y.S.2d 509 (2d Dep't 2002); Bellefonte Ins. Co. v. Eli D. Albert. P.C., 472 N.Y.S.2d 635, 99 A.D.2d 947 (1st Dep't 1984); Sparacino v. Pawtucket Mut. Ins. Co., 50 F.3d 141, 143 (2d Cir. 1995) ("[t]he test for determining whether the notice provision has been triggered is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim")

However, the burden falls with the attorney to prove the reasonableness of the excuse for failing to report. As discussed above, the courts continue to narrow the circumstances where an attorney will be deemed to have a reasonable belief of non-liability and have refused to let the case go to a jury. See e.g. Wilson v Quaranta, 18 A.D.3d 324, 795 N.Y.S.2d 532 (1st Dep't 2005); Cade & Saunders, P.C. v. Chicago Ins. Co., 307 F. Supp. 2d 442, 446 (N.D.N.Y. 2004)

3. Misrepresentations and Late Notice

a. What is the Purpose/Importance of Notice Provisions?

1) Allowing the insurer to properly and adequately investigate and respond to claims.

2) Allowing the insurer to end or correct dangerous conditions/occurrences.

3) Giving the insurer an opportunity to achieve an early settlement

4) Allowing the insurer set reserves and aid in the detection of fraud.

Fein v. Chicago Ins. Co., 2003 U.S. Dist. LEXIS 12374, 12-13 (S.D.N.Y. 2003) (citations omitted); Cass v. American Guarantee & Liability Ins. Co., 2006 NY Slip Op 52169U; 13 Misc. 3d 1238A; 2006 N.Y. Misc. LEXIS 3358 (Sup. Ct. N.Y. County 2006)

Cade & Saunders, P.C. v. Chicago Ins. Co., 307 F. Supp. 2d 442, 446 (N.D.N.Y. 2004) (internal citations omitted) - In New York, "compliance with the notice provisions of an insurance contract is a condition precedent to an insurer's liability." Therefore, "if an insured fails to provide timely notice as required by the particular policy, then, absent a valid reason for the delay, the insurer is under no obligation to defend or indemnify the insured."

b. When is Notice Untimely?

Courts look to the language of the policy to determine the urgency of reporting. The main question is whether the obligation is to provide notice "immediately" vs. "as soon as practicable." As discussed previously, the answer is contained with the notice provision of the policy.

Chicago Ins. Co. v. Borsody, 165 F. Supp. 2d 592, 599 (S.D.N.Y. 2001) - In any event, whether analyzed under a requirement of "immediate" notice or notice "as soon as practicable," the 40-day delay here cannot be justified under all the circumstances.

Cass v. American Guarantee & Liability Ins. Co., 2006 NY Slip Op 52169U; 13 Misc. 3d 1238A; 2006 N.Y. Misc. LEXIS 3358 (Sup. Ct. N.Y. County 2006) – Notice "more than four months after a lawyer with plaintiffs' knowledge reasonably could have expected a claim was untimely as a matter of law."

Chicago Ins. Co. v. Halcond, 49 F. Supp. 2d 312, 320 (S.D.N.Y. 1999) Unexplained delays of 68 and 38 days in reporting claims failed to satisfy the policy requirement of notice "as soon as practicable."

American Ins. Co. v Fairchild Indus., Inc., 56 F.3d 435, 440 (2d Cir. 1995) ("Under New York law, delays for one or two months are routinely held unreasonable"); Deso v. London & Lancashire Inc., 3 N.Y.2d 127, 164 N.Y.S.2d 689 (1957) (51 days); Rushing v. Commercial Casualty Ins., 251 N.Y. 302 (1929) (22 days); Haas Tobacco Co. v. American Fidelity Co., 227 N.Y. 343 (1919) (10 days); Heydt Contracting Corp. v. American Home Assurance Co., 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dep't 1989) (4 months); Power Authority of the State of New York v. Westinghouse Electric Corp., 117 A.D.2d 336, 502 N.Y.S.2d 420 (1st Dep't 1986) (53 days); Republic New York Corp. v. American Home Assurance Co., 125 A.D.2d 247, 509 N.Y.S.2d 339 (1st Dep't 1986) (45 days); Goodwin Bowler Assocs., Ltd. v Eastern Mut. Ins. Co., 259 A.D.2d 381, 687 N.Y.S.2d 126 (1st Dep't 1999) (two-month delay unreasonable);

c. Insurer Need Not Show Prejudice Caused by the Insured's Delay in Reporting

Insured's commonly assert: "What is the harm to the insurance company if I don't report the claim (or potential claim) for a few months? The insurance company hasn't been prejudiced . . ." However, in New York, this argument carries no weight. Wilson v. Quaranta, 18 A.D.3d 324, 795 N.Y.S.2d 532 (1st Dep't 2005) – ("[U]ntimely notice of the malpractice claim negates coverage whether or not the delay caused [the insurer] any prejudice . . ."); Sirignano v. Chicago Insurance Company, 192 F.Supp. 199, 2002 WL 480565 (S.D.N.Y.) (same)

B. What is Covered Under the Typical Lawyers Professional Liability Policy

1. The Scope of Professional Services

a. Generally

- The insured must look, in the first instance, to the insuring agreement to determine if their alleged conduct triggers the policy's coverage
- Refer to the policy's definition of professional services
- Generally what is covered under the Lawyers Professional Liability policy are acts not covered under a General Liability policy
- In general, in order to obtain coverage, the insured must be acting in his/her capacity as an attorney (i.e., not as an employer, landlord, etc.) in furtherance of his law firm's professional activities

b. Examples of Typical Clauses

1) Insurance Company "A" --Typical Clause:

III. Definitions

* * *

L. "Professional Services" means services provided to others by an Insured

1. in the conduct of any business by or on behalf of the Firm in its professional capacity as attorneys or notaries public;

2. as an administrator, conservator, executor, trustee, guardian, receiver or committee or in any similar fiduciary capacity incidental to the practice of law by the Firm;

3. as an arbitrator or mediator;

4. as a member, director or officer of any professional legal association, its governing board, or any of its committees;

5. as a government affairs advisor or lobbyist; or

6. as a title insurance agent pursuant to a written agency agreement with a licensed title insurance company

but only if such services are performed in the name or on behalf of the Firm and some or all of the fee, if any, accruing from such services (regardless of whether such fee is actually collected) inures to the benefit of the Firm.

2) Insurance Company "B"--Typical Clause:

I. *COVERAGE:*

This Policy is to indemnify, subject to its terms, conditions, exclusions and limitations, any ASSURED (as hereinafter defined) in respect to any CLAIM first made against any ASSURED during the POLICY PERIOD by reason of any ACT (as hereinafter defined) committed at any time prior to the end of the POUCY PERIOD wherever such act was or may have been committed or alleged to have been committed:

1. by any ASSURED or any other person or entity in the conduct of any business conducted by or on behalf of the FIRM in its professional capacity as Attorneys, Counselors at Law or Notaries, or

2. by any ASSURED acting in his/her professional capacity as Attorney, Counselor at Law or Notary of the FIRM (whether or not in the name of the FIRM), provided always that a portion of the fee for legal services (if a fee is charged) accruing from such work inures to the benefit of the FIRM. In extension and not in limitation of the foregoing such work shall be deemed to include work as an administrator, executor, trustee, guardian, arbitrator, committee for incompetent, agent to title insurance company and/or designated issuing attorney to a title insurance company, or other fiduciary, or similar agent or advisor; provided always that, in cases where no portion of the fee for legal services associated with such work inures to the benefit of the FIRM, a portion of the fee (if a fee is charged) for non-legal services associated with such work inures to the benefit of the FIRM or such work was performed with the prior written approval of the designated representatives of the FIRM as provided in Clause IV, Condition 13.

If, whether with or without the acquiescence of the FIRM, a fee is charged by any ASSURED acting in his/her professional capacity as Attorney, Counselor at Law, or

Notary and no portion of such fee in fact inures to the benefit of the FIRM, then this clause shall not be applied to deny cover to any ASSURED who did not benefit from such fee.

II. *DEFINITIONS:*

* * *

3. The term 'ACT' shall mean any act, error or omission (whether of acts, facts, law or otherwise), breach of contract for professional services, breach of duty, libel or slander, false arrest, detention or imprisonment, wrongful entry or eviction, invasion of the right of private occupancy,

malicious prosecution, abuse of process, violation of the right of privacy, or any allegation thereof.

c. Case Law

Many legal malpractice policies limit coverage to claims caused by acts, errors or omissions arising out of the rendering or failure to render professional services for others in the capacity as a lawyer.

In determining whether an insurance carrier has a duty to defend under a professional liability policy, it is well settled that the court must compare the complaint against the insured with the language of the policy. *Tartaglia v. Home Insurance Company*, 240 A.D.2d 396, 397 658 N.Y.S.2d 388, 390, (2d Dept. 1997); *Cohen v. Employers Reinsurance Corp.*, 117 A.D.2d 435, 438, 503 N.Y.S.2d 33 (1st Dept. 1996). If the allegations in the complaint fall within the scope of risk covered by the policy, the insurance carrier is obligated to defend the insured. If, on the other hand, the allegations on their face do not bring the case within the coverage of the policy, there is no duty to defend or indemnify. *Tartaglia*, 240 A.D.2d at 390.

- *Tartaglia v. Home Insurance Company*, 240 A.D.2d 396, 658 N.Y.S.2d 388 (2d Dept. 1997).

  Attorney was sued for devising and implementing a scheme to defraud his client's creditors. Because the complaint did not allege any negligence on the part of the attorney – only intentional fraudulent conduct, his professional liability carrier disclaimed coverage.

  In a subsequent declaratory judgment action to determine the validity of the disclaimer, the Appellate Division, Second Department held that there was no coverage under the policy. In particular, the policy provided coverage for claims arising out of the insured's "rendering or failure to render professional services for others in the capacity as a lawyer." Because there were no allegations of negligence arising out of the defendant's performance of professional services in his capacity as an attorney, the claim did not fall within the ambit of the policy.

2. Non-Covered Acts, Errors or Omissions

a. Generally

- If conduct giving rise to a claim does not fall within certain categories no coverage will be provided

- Categories exclude for coverage include but not limited to the following: negligence, error, breach of contract

b. Insurance Company "D" --Typical Clause:

III. DEFINITIONS:

* * *

O. Wrongful Act means any actual or alleged:

1. negligent act., error or omission;

2. breach of contract;

3. breach of fiduciary duty; or

4. libel or slander;

committed or attempted, or allegedly committed or attempted, solely in the performance of or failure to perform Professional Services by any Insured or by any other person or entity for whose actions the Insured is legally responsible.

c. Case Law

Admiral Ins. Co. v. Weitz & Luxenberg, P.C., 2002 WL 31409450 (S.D.N.Y.)

Complaint against attorney seeking restitution alleged a variety of acts, including backdating documents, extortionate threats and witness tampering. The legal malpractice carrier initially defended the insured, but following a motion to dismiss certain causes of action, the carrier disclaimed coverage and commenced a declaratory judgment action to validate its disclaimer.

The U.S. District Court for the Southern District of New York held that the carrier was obligated to defend the insured, but had only a limited obligation to indemnify. In doing so, the Court noted that the policy provided coverage for damages arising out of "wrongful acts" – those acts or omissions arising out of professional services. The Court held that certain acts such as the improper dating of documents, although dishonest, were within the scope of an attorney's professional services. As such, the insurer was obligated to defend the insured.

However, because the policy provided coverage for "damages", the claims for restitution fell outside the scope of coverage.

3. Damages Excluded from Coverage

a. Generally

- Most professional liability policies list the types of damages which are not covered
- Additionally, it should be noted that, whether the policy states this or not, New York State's public policy prohibits insurance companies from paying punitive damages assessed against their insured

b. Typical Clause

1) Insurance Company "E"--Typical Clause:

III. DEFINITIONS:

* * *

J. Loss means the amount(s) which the Insureds become legally obligated to pay on account of a Claim, including damages, judgments, any award of pre-judgment or post-judgment interest, settlement amounts, costs and fees awarded pursuant to judgments, and Defense Costs.

Loss does not include:

1. any amounts for which the Insureds are legally or financially absolved from payment;

2. taxes, fines, penalties or sanctions imposed by law against the Firm (other than punitive or exemplary damages);

3. the return of fees or other compensation paid to the Insured;

4. the cost of re-performing or completing any Professional Services;

5. the cost of compliance with an injunction or any other non-monetary relief; or

6. matters uninsurable under the law applicable to this Policy.

However, in determining the insurability of punitive or exemplary damages, or the multiplied portion of any multiplied damage award, it is agreed that the law of the jurisdiction most favorable to the insurability of those damages will control for purposes of

resolving any dispute between the Insurer and the Insureds, provided that such jurisdiction is:

a. where the punitive, exemplary or multiplied damages were awarded or imposed;

b. where the Wrongful Act underlying the Claim took place;

c. where either the Insurer or any Insured is incorporated or organized, has its principal place of business or resides; or

d. where this Policy was issued or became effective.

2) Insurance Company "F"--Typical Clause:

DEFINITIONS:

* * *

6. The term "CLAIM" shall mean:

a. any written demand in which damages are sought against any ASSURED;

b. any written notice received by any ASSURED from, or on behalf of, any person that it is the intention of such person to hold the ASSURED responsible for the results of any specified ACT; or

c. written notice of the commencement of any judicial, administrative or other proceeding against any ASSURED.

All CLAIMS (regardless of whether they involve one or more ASSUREDS) arising out of the same ACT, or series of related ACTS, shall constitute a single CLAIM, irrespective of the number of claimants and shall be deemed to have been made during the POLICY PERIOD in which such CLAIM arising from the ACT or series of related ACTS is first made against such ASSUREDS without regard to the POLICY PERIOD(S) in which later CLAIMS arising out of such ACT or series of related ACTS are asserted.

III. EXCLUSIONS:

* * *

7. to the extent it is uninsurable by law:

a. any CLAIM for fines, penalties, punitive or exemplary damages, imposed by a judgment or any other final adjudication. However, this

exclusion shall not apply to reasonable costs, charges and expenses incurred in the defense of any CLAIM otherwise covered by this Policy which also demands such fines, penalties, punitive or exemplary damages;

b. *b. any award of treble or other multiple damages pursuant to any statute or law, except that the compensatory amount of such award, prior to being multiplied, shall be deemed covered if the ACTS giving rise to a CLAIM upon which such compensatory award is based are otherwise covered by this Policy. However, this exclusion shall not apply to reasonable costs, charges and expenses incurred in the defense of any CLAIM otherwise covered by this Policy solely by reason of the fact such CLAIM demands treble or other multiple damages;*

c. Case Law

Admiral Ins. Co. v. Weitz & Luxenberg, P.C., 2002 WL 31409450 (S.D.N.Y.)

As discussed above, the Complaint against an attorney alleged misconduct and sought restitution. The legal malpractice carrier initially defended the insured, but following a motion to dismiss certain causes of action, the carrier disclaimed coverage and commenced a declaratory judgment action to validate its disclaimer.

The policy provided coverage for "damages" arising out of "wrongful acts" – those acts or omissions arising out of professional services." Because the policy provided coverage only for "damages", the claims for restitution fell outside the scope of coverage.

Public Service Mutual Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981)

Client sued dentist, alleging a sexual abuse during the course of treatment, and sought punitive damages. The dentist's professional liability carrier commenced a declaratory judgment action to confirm that the claims were not covered.

The New York Court of Appeals held the insurance carrier was obligated to defend the insured, but could not determine the obligations for indemnification. The policy provided coverage for

"all sums, including punitive damages . . . because of injury resulting from professional dental services." The policy identified certain claims which were covered, including error, negligence and undue familiarity. The Court held that the policy provided coverage for inappropriate physical contact, and the carrier was obligated to defend the insured.

The Court also indicated that, although there could be circumstances in which the carrier was obligated to indemnify the insured for compensatory damages, under no circumstances could the carrier be obligated to indemnify the insured for punitive damages (which would be against public policy). The fact that the policy provides for such coverage was immaterial – "an agreement between two private parties, no matter how explicit, cannot change the public policy of this State."

4. Typical Exclusions

a. Generally

- Exclusions removed enumerated types of claims from the coverage afforded by the policy.

- While it is the burden of the insured to prove that a claim falls within the coverage of the policy, if the insurer counters that the claims is otherwise removed from coverage by way of an exclusion, the insurer bears the burden of proving that the exclusion applies.

b. Examples of typical exclusions:

1) Known Claims or Circumstances.

2) Intentional, Fraudulent, Criminal, Malicious, or Deliberately Wrongful Acts or Omissions.

3) Certain Service and Capacities.

Claims that arise from insured's services or capacity as:

- Officer, director, partner, trustee, manager, operator, or employee of an organization other than the named insured;
- Public official or employee;
- ERISA or similar statute.

4) Bodily Injury and Property Damage.

5) Insured versus Insured.

6) Insured Equity Interest in Organization for which Insured Provides Services.

7) Fee Claims.

8) Punitive or Exemplary Fines, Damages, Costs or Sanctions.

c. Case Law

1) Claims That The Insured "Knew or Could Have Reasonably Foreseen"

Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman, LLP, (E.D.N.Y. 2006) is a recent and detailed interpretation of the exclusion. The Court upheld application of the exclusion based upon a statement made by the insured attorney in open court notwithstanding the attorney's protest that he made the statement as part of argument in favor of his client and that he did not really believe that there was any basis for a malpractice suit against him or his firm. The Court held that the subjective thoughts of the attorney had to be rejected and thus the insurer had proven that objective standard that the attorney knew or could have reasonably foreseen the potential of a claim. The Court wrote:

> … when evaluating the applicability of Exclusion B to claims arising from the Medical Malpractice Action, the Court must disregard Lewis Johs' and Aviles' subjective beliefs regarding whether Dr. Wright would file suit, as such beliefs are irrelevant. *See Westport Ins. Corp.*, 2006 U.S. Dist. LEXIS 31329, at *11 (citation omitted). Instead, the Court must engage in an objective inquiry, namely, whether or not, under the circumstances of this case, a reasonable lawyer would know or could reasonably foresee that Dr. Wright might file a legal malpractice claim. *Westport Ins. Corp.*, 2006 U.S. Dist. LEXIS 31329, at *15-6. Aviles' on-the-record statement makes clear that she was, at the very least, aware of the possibility that a legal malpractice claim might ensue from the slide review error.

The Court also noted that an open court statement, more so thatn other statements, is to be given force and effect as follows:

> The lawyer's role as court officer admittedly places Lewis Johs and Aviles in a difficult position, given the context of this case. If this Court believes that Aviles' prediction of a legal malpractice claim was nothing more than empty rhetoric, Defendants may survive summary judgment, but Aviles' admission that the prediction was disingenuous may jeopardize her professional credibility, as well as the credibility of her firm. Such a result arguably taints the effectiveness of the entire state bar, as it is the sum of each attorney's integrity that creates the whole. *See id.* (*citing* N.Y.Code of Prof'l Responsibility EC 1-1) ("It is the ethical responsibility of *every lawyer* to maintain the integrity and improve the competence of the Bar to meet the highest standards.") (emphasis added). However, if this Court holds Aviles accountable for her statement, then the statement will prove fatal to Defendants' quest for insurance coverage. The Court appreciates this dilemma, recognizing that neither situation is ideal for Lewis Johs and Aviles. However, this Court cannot, as Aviles presumably encourages it to do, ignore the general principle that an attorney should be held accountable for statements made to a court during judicial proceedings.
>
> With respect to Aviles' second equivocation, namely, that she did not "personally believe" that Dr. Wright would sue for malpractice, the Court reiterates that any dispute regarding whether Aviles or Lewis Johs believed-on the basis of their views regarding the likelihood of success of a legal malpractice suit, their relationship with Dr. Wright, or their impression of Dr. Wright's reaction to the ultimate outcome of the Medical Malpractice Action-that Dr. Wright would in fact make a malpractice claim is not relevant for this Court's analysis. *See* *Mt. Airy Ins. Co. v. Klatsky & Klatsky*, 954 F.Supp. 1073, 1080 (W.D.Pa.1997).

On the issue of waiver by virtue of the insurer's delay in disclaiming, the Court held:

> New York courts, in establishing various general principles regarding disclaimers and denials of insurance coverage, have recognized that insurance coverage is not merely what is found under the heading "insuring agreement," which affirmatively indicates the coverage that is included, but is also the exclusion clauses, which describes expressly what is not covered by the insurance policy's provisions. *Albert*

> *J. Schiff Assocs., Inc. v. Flack*, 51 N.Y.2d 692, 435 N.Y.S.2d 972, 417 N.E.2d 84, 86 (N.Y.1980). Where an exclusion makes clear that coverage under an insurance policy does not exist, coverage cannot be attained by waiver, which is a voluntary and intentional relinquishment of a known right. *Id.* at 87. The purpose of waiver is to avoid "forfeitures of [an] insured's coverage [that] would otherwise result where an insured breached a policy condition," such as, failure to give timely notice of a loss. *Id.* However, where the issue is the existence or nonexistence of coverage (that is, the insuring clause and exclusions), the doctrine of waiver is simply inapplicable under New York law. *Id.*
>
> In this case, Coregis and Defendants dispute whether or not claims arising from the Legal Malpractice Action are covered by the Policy. Such a dispute, in the Court's view, falls within the ambit of the coverage-no coverage dichotomy explained in *Schiff.* As a result, Defendants' arguments regarding Coregis' alleged waiver of the right to disclaim coverage for claims arising from the Medical Malpractice Action cannot be sustained**.**

In a footnote (10), the Court also rejected an estoppel argument as follows:

> The Court notes that an estoppel theory, based on allegations that Coregis twice renewed Lewis Johs' malpractice insurance, accepted the firm's premium payments, and arguably used the notice of potential claim to increase Lewis Johs' premium at each renewal, would have been equally as unsuccessful as Defendants' waiver theory with respect to the right to disclaim coverage in light of Coregis' timely disclaimer. *See Chicago Ins. Co. v. Halcond*, 49 F.Supp.2d 312, 320 n. 38 (S.D.N.Y.1999) (noting that, although relevant to the right of an insurer to rescind, an insured's argument that an insurer is estopped-by its renewal of a policy and acceptance of premiums after receiving notice of two lawsuits-from disclaiming coverage for the insured's failure to give timely notice of such suits is insufficient to preclude insurer from disclaiming coverage, so long as insurer promptly disclaimed).

2) Intentional/ Fraudulent / Criminal

Steadfast Ins. Co. v. Stroock & Stroock & Lavan, LLPC., 108 Fed.Appx. 663, 2004 WL 1759133 (2d Cir. 2004). In an adversary proceeding arising from a transaction involving Helionetics and KSWI, claims were asserted that principal shareholders of Helionetics, assisted by their counsel, Stroock, "agreed on a plan and scheme to remove KSWI, [Helionetics'] only profitable asset, from under the umbrella of [Helionetics] by way of a distribution of the KSWI common stock" to themselves. Stroock settled the claims brought against it in the adversary proceeding, and sought coverage from Steadfast (Stroock's malpractice insurer) which had disclaimed based upon the knowingly wrongful exclusion and the unlawful profit gain or advantage exclusions of the policy. The Court upheld the exclusion as follows:

> The policy provides that Steadfast will not pay losses or expenses "based on, arising out of or resulting from *in fact"* claims alleging that an insured committed a knowingly unlawful act or received a benefit to which it was not legally entitled. (emphasis added) Stroock contends that the use of the term "in fact" means that an exclusion from coverage "may not be based simply on the mere allegations in the underlying complaint" and that, therefore, the district court erred "[b]y failing to require Steadfast to prove that Stroock 'in fact' received an illegal profit or advantage, or that Stroock 'in fact' acted in a 'knowingly wrongful' manner."
>
> Reading such a requirement into the Policy is clearly wrong because the only way Steadfast could "prove" in the district court that excluded conduct occurred is to actually hold a trial on the claims asserted against Stroock in the adversary proceeding. That is an absurd result. Rather, as Steadfast argues, the " '[i]n fact' exclusion language applies to limit the application of the exclusion only when a court's finding of liability could be based [either] on conduct covered by the policy, or upon ... conduct that is excluded." But the claims asserted against Stroock in the adversary proceeding sounded *only* in fraud, which is excluded conduct under the Policy. The claims did not sound in negligence, which is conduct covered by the Policy. That is, proof of knowing wrongdoing by Stroock was an essential element of liability against it, and, as the district court found, "Steadfast disclaimed coverage for all causes of action for which actual knowledge of wrongdoing is an essential element."

Seskin & Sassone v Liberty International Underwriters, 306 A.D.2d 520, 761 N.Y.S.2d 679 (2d Dep't 2003) (Legal malpractice policy did not cover claims against insured for fraud, negligent representation, and deceptive trade practices while acting in his capacity as president of medical equipment manufacturer.)

Tartaglia v Home Insurance Co., 240 A.D. 2d 396, 658 N.Y.S. 2d 388 (2d Dep't 1997)(Attorney who devised a scheme to fraud his client's creditors was not covered by professional liability policy and claims were excluded by the dishonest, deliberately fraudulent criminal acts or deliberately wrongful acts exclusion).

Chicago Ins. Co. v Borsody, 165 F.Supp.2d 592 (S.D.N.Y. 2001)(Attorney misrepresentations to health insurers was not a negligent act and was excluded by fraud and dishonest acts exclusion).

See also Albert J. Schiff Associates Inc., v Flack, 51 N.Y.2d 692, 435 N.Y.S2d 972 (1980) (New York Court of Appeals denied coverage under broker and agent errors and omissions policy where claim was for willful and malicious usurpation of trade secrets); National Union Fire Insurance Co. v. AARPO, 1999 WL 14010 (S.D.N.Y. 1999)(Insurance agent errors and omissions policy does not cover RICO and fraud claims in the insuring agreement and excludes same with dishonest, fraudulent, criminal, malicious acts exclusion).

Some policies provide "Innocent Insured" coverage for those insured that are not actively involved in the intentional or fraudulent conduct. The application of that "safe harbor" itself may also be a matter in dispute on a case by case basis. See Westport Resources Investment Services, Inc. v. Chubb Custom Ins. Co., 110 Fed. Appx. 172, 2004 WL 2166308 (2d Cir. 2004), where in the context of a broker's professional liability policy, the Court interpreted the innocent insured or "safe harbor" provisions of the intentional, criminal fraudulent act exclusion as follows:

> The intentional acts exclusion states, in relevant part, that coverage does not apply to any claim "brought about or contributed to by ... any knowing, intentional, fraudulent, or dishonest Wrongful Act by an Insured." Westport conceded below that Good was "an Insured" under the Policy, and there is no question that the underlying claims against Westport were "brought about or contributed to by" Good's fraudulent conduct. As Westport points out, the

> Policy's intentional acts exclusion includes a safe harbor provision for those insured parties who have not "participated or acquiesced in the knowing, intentional, fraudulent, or dishonest act." Westport is principally alleged to have been negligent in failing to supervise or monitor Good. However, the safe harbor does not apply to "[c]laims based on or directly or indirectly arising out of or resulting from, in whole or in part, an Insured's commission of ... any ... criminal act." Because Good's conduct was undisputedly criminal and the underlying claims against Westport are "based on" and directly "aris[e] out" of Good's conduct, the safe harbor provision does not remove Westport from the operation of the intentional acts exclusion, which bars coverage for the underlying claims. *See* *Mt. Vernon Fire Ins. Co. v. Creative Housing Ltd.*, 88 N.Y.2d 347, 352, 645 N.Y.S.2d 433, 668 N.E.2d 404 (1996); *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 163, 581 N.Y.S.2d 142, 589 N.E.2d 365 (1992).

Many policies also specifically acknowledge the obligation to defend, although not indemnify, even as to insureds alleged to have acted intentionally, dishonestly or in perpetration of a fraud. See Rooney v Chicago Insurance Co., 26 Fed.Appx. 53, 2001 WL 1486527 (2nd Cir.(N.Y.)); Admiral Insurance Company v Weitz & Luxenberg, P.C., 202 WL 31409450 (S.D.N.Y. 2002).

3) Law firm or Attorney Has Pecuniary or Beneficial Interest In Client

Salzman & Salzman v. Home Ins. Co., 258 A.D.2d 455, 684 N.Y.S.2d 601 (2 Dep't 1999). The policy excluded coverage for legal malpractice claims "based upon or arising out of work performed by the insured with respect to any corporation" in which the insured "has any pecuniary or beneficial interest". Specifically, the exclusion provided that ownership by an insured of 10% or more of the outstanding shares of a corporation is considered a pecuniary or beneficial interest. The claims of malpractice arose out of two separate financial transactions: (1) a $43,000 loan made by the plaintiff Salzman & Salzman to EMA Multimedia, Inc., a plaintiff in the underlying malpractice action, and (2) a line of credit agreement involving the plaintiffs in the underlying malpractice action and Churchill Megasoft, Inc. (hereinafter Churchill), a Pulier family-owned corporation in which the plaintiff Anita S. Pulier had a 25% ownership interest. The Court held that the line of credit transaction falls within the

exclusion of the policy, since the plaintiff Anita S. Pulier owned 25% of Churchill, but it was unclear (issue of fact) whether the $43,000 loan transaction would clearly fall within the exclusion.

But see Oot v. Home Ins. Co. of Indiana, 244 A.D.2d 62, 676 N.Y.S.2d 715 (4 Dep't 1998), which held the provision to be be vague and unenforceable as follows:

> …it is not clear from the policy that a "pecuniary or beneficial" interest includes that of a creditor such as a mortgagee. A reasonable attorney might have believed that a malpractice claim against him under the circumstances present here would be covered under the policy despite that exclusion. "[E]xclusions or exceptions from policy coverage must be specific and clear in order to be enforced", and "[t]hey are not ***71** to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Seaboard Sur. Co. v. Gillette Co., supra,* at 311, 486 N.Y.S.2d 873, 476 N.E.2d 272).

In similar fashion, the Court held:

> If defendant intended to exclude from coverage former attorneys who have been disbarred, it should have stated that exclusion unambiguously. This it failed to do. The ambiguity must be resolved in favor of the insured and against the insurer (*see,* ****720***United States Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 492 N.E.2d 1206; *General Acc. Ins. Co. v. U.S. Fid. & Guar. Ins. Co.,* 193 A.D.2d 135, 137, 602 N.Y.S.2d 948).

4) Return or Restitution of Legal Fees

Restitution or reimbursement of fees is often treated in several sections of the professional liability policy, including the definition of claim, damages, and exclusions.

McCostis v. Home Ins. Co. of Indiana, 31 F.3d 110, RICO Bus.Disp.Guide 8650 (2d Cir. 1994). Policy exclusion for disputes concerning return or restitution of legal fees did not unambiguously apply to disputes concerning fees paid to third parties, such that insurer would have no duty to defend. The Court held:

> Examining the language of the insurance contract, we believe that the policy does not provide a clear answer to

> the question of whether the return or restitution of legal fees exclusion would be applicable for disputes concerning fees paid to third parties. The exclusion provision could mean, as the district court effectively concluded, that all client billing controversies are excluded from coverage. On the other hand, the use of the words "return" and "restitution" seems to indicate that the exclusion would pertain only to situations where the insured received the disputed funds and is forced to repay the monies to the client. Accordingly, we find that the return or restitution of legal fees exclusion is ambiguous as applied to McCostis in this case.

But see Admiral Ins. Co. v. Weitz & Luxenberg, P.C. 2002 WL 31409450 (S.D.N.Y. 2002), holding:

> New York law recognizes that the word "Damages" does not include a claim for restitution of money that was wrongfully obtained by an insured. *Reliance Group Holdings v. National Union Fire Ins. Co.*, 188 A.D.2d 47, 594 N.Y.S.2d 20, 24 (1st Dep't 1993); *see also DeBruyne v. Clay,* No. 94 Civ. 4704, 1999 U.S. Dist. LEXIS 4704 (S.D.N.Y. Oct. 1, 1999) ("[O]ne may not insure against ... the orders of a court sitting in equity."); *Hatfield v. 96-100 Prince Street,* No. 94 Civ. 3917, 1997 U.S. Dist. LEXIS 3804 (S.D.N.Y. April 1, 1997) ("Under New York public policy, one may not insure against the risk of being ordered to return funds that have been wrongfully acquired; such awards are not 'damages' within the purview of insurance policies.").

5) Retroactive Date

Professional liability policies also may include a "Retroactive Date" which, depending on its wording may preclude coverage for claims arising from conduct prior to a specific date, and when a claim is removed from coverage by the Retroactive Date, there is no duty to defend. See Coregis v. Blancato P.C., 75 F.Supp.2d 319 (S.D.N.Y. 1999). The Blancato Court held that merely continuing to represent the client beyond the retroactive date does not create coverage when the malpractice occurred prior to the retroactive date:

> First, it asserts that "[e]ven if many of the acts of legal malpractice alleged occurred prior to an exclusion date, if some acts occurred after the exclusion date the insurance

company owes the plaintiff a duty to defend" (Def.Br. at 3), and cites for that contention *Sacks and Sacks v. Home Ins. Co.*, 198 A.D.2d 139, 604 N.Y.S.2d 56 (1st Dept.1993). Varella seems to be arguing, in other words, that a continuous sequence of malpractice may extend coverage under a malpractice policy to the portion of the malpractice that occurred prior to the Retroactive Date. Even if this argument were sound, Varella points to no specific acts of malpractice that took place after the Retroactive Date, but rather makes only the bare allegation that Blancato "continued acts of malpractice" up until December 13, 1998, when Blancato formally withdrew as counsel. (Def.Br. at 2). More to the point, however, the Appellate Division's two-paragraph opinion in *Sacks* provides no support for such disregard of the unambiguous policy terms. In *Sacks*, the court upheld the ***322** trial court's ruling that the defendant-insurer was obligated to defend the plaintiffs in the underlying action on the ground that it was unclear from the record whether all of the acts of malpractice were within the prior acts exclusion of the policy in that case. The court did no more than endorse the lower court's conclusion that absent a showing "that the allegations of the [underlying] complaint cast the pleading entirely within the policy exclusion," the insurer owes a duty to defend. *See id.* (citation omitted). In this case, with the exception of Varella's wholly unsubstantiated assertion in its brief that Blancato's malpractice continued until he withdrew, it is undisputed that all the acts of malpractice at issue occurred before August 6, 1996.

. . .

Varella next argues that Coregis is required to defend and indemnify Blancato because Blancato remained as counsel of record and continued to act for Varella in the underlying action after the Retroactive Date. It cites as support a number of cases to hold that the authority of an attorney continues until that attorney is removed by court order or by stipulation. *See, e.g.*, *Blondell v. Malone*, 91 A.D.2d 1201, 459 N.Y.S.2d 193 (4th Dept.1983). But Varella directs the Court to no legal authority, let alone basis in logic, for its argument that an insurer may be forced to defend an insured for acts of legal malpractice occurring outside the terms of its policy simply by virtue of the fact that the attorney continues to act on the client's behalf after the policy becomes effective.

6) Claims Made and Reported

Claims made policies cover only claims first made and first reported during the policy period. Accordingly, claims made prior to the policy's inception date or reported to a prior insurer are not covered under the policy. See Rosenbaum v. Chicago Insurance Co., 306 A.D.2d 29, 761 N.Y.S.2d 637 (1st Dep't 2003).

d. Defense Afforded Even Though Exclusions May Apply

Some policies specifically provide that even though no coverage is afforded for claims or damages premised on criminal/dishonest/fraudulent/malicious acts, errors and omissions, the insurer will nonetheless afford a defense. See Admiral Insurance Company v Weitz & Luxenberg, P.C., 202 WL 31409450 (S.D.N.Y. 2002).

Moreover, New York law requires that when there is a duty to afford a defense, a carrier must defend all claims. Fitzpatrick v American Honda Motor Co. Inc., 78 N.Y. 2d 61, 571 N.Y.S.2d 672 (1991).

The inclusion of covered and un-covered claims also may give rise to defense issues. See Rosenberg & Estis P.C. v. Chicago Insurance Company, 2003 WL 21665680 (N.Y. Sup.), 2003 N.Y. Slip Op. 51085(U) (Sup. NY 2003) citing Public Service Mutual v Goldfarb, 53 N.Y.2d 392, 442 N.Y.S.2d 422 (1981).

But see Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman, LLP, (E.D.N.Y. 2006), rejecting the need for separate counsel as follows:

> Defendants' position that Coregis was obligated to designate separate counsel once it realized that a coverage issue may exist is simply unsupported by New York law. The case on which Lewis Johs relies for this proposition, *Prashker v. U.S. Guarantee Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910, 136 N.E.2d 871 (N.Y.1956), does not in fact create such a rule. Rather, *Prashker* confirms that, when a conflict of interest arises between an insurer and an insured, the insured should select their own counsel and the expense should be covered by the insurer. *See Prashker*, 154 N.Y.S.2d 910, 136 N.E.2d at 876. In this case, Lewis Johs has not alleged that there is an actual or potential conflict of

> interest with Coregis. *See* *Elacqua v. Physician's Reciprocal Insurers*, 21 A.D.3d 702, 800 N.Y.S.2d 469 (N.Y.App.Div.2005) (holding that an insurer was estopped from asserting coverage defenses because insurer did not apprise insured of right to independent counsel after conflict of interest arose, wherein certain direct claims against the insured physicians were covered while vicarious liability claims for the negligence of a nurse-practitioner were not).

See also Napoli, Kaiser & Bern, LLP v. Westport Ins. Corp. 295 F.Supp.2d 335 (S.D.N.Y. 2003) finding a gray line between covered and excluded claims warranting a defense as to claims of fraud, as follows:

> …under New York law, the standard is whether there is any "possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision." *Frontier*, 690 N.E.2d at 868-69. To be relieved of its duty to defend, the insurer must demonstrate that "each and every claim asserted" against the insured is "unambiguously not covered or unambiguously excluded from coverage." *Cowan*, 1999 WL 1029729, at *5. If one claim against NKB potentially falls within the Policy's coverage, Westport has a duty to defend the entire action. *See, e.g., id.* at *5; *Frontier*, 667 N.Y.S.2d 982, 690 N.E.2d at 869; *Seaboard Sur. Co.*, 486 N.Y.S.2d 873, 476 N.E.2d at 275. Westport, therefore, cannot escape its duty to defend by arguing that the Court should ignore the possibility that NKB will be found liable for a negligent breach of fiduciary duty to the referred clients and/or the referring firms.

Mandel Resnik Kaiser Moskowitz & Greenstein P.C. v. Executive Risk Indem. Inc., 2005 WL 1712024 (S.D.N.Y. 2005) allowed for defense of a billing dispute as follows:

> The policy's exclusions, as stated in Section III, do not specifically exempt billing disputes from coverage. The policy as a whole covers claims made against the insured for Wrongful Acts, which are defined in Section II.J. of the Policy as "any actual or alleged act, error, omission, breach of contract or duty, libel or slander ... but only in connection with the performance of, or actual or alleged failure to perform, Professional Services." Professional Services are "services provided to others ... as an attorney."

(Policy Section II.H; Resnik Aff. Exh. B.) The policy neither specifies nor limits the definition of those services.